SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 594

ARTHUR LEVIN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Petitioner convicted under an unconstitutional Maryland statute for the sale of obscene pictures?

2. Were the pictures determined to be obscene by constitutional standards?

STATEMENT OF THE CASE

The Petitioner, owner of the Baltimore Book Bizarre (sic), a bookstore in downtown Baltimore, was convicted in the Criminal Court of Baltimore of a violation of Article 27, Section 418(a), of the Annotated Code of Maryland (1957 Edition) for the sale of three packets of obscene pic-

tures to a police officer. The pictures, three of which were introduced in evidence, generally showed a nude male figure with penis in full erection. One State's exhibit was a picture of a nude male fondling his penis; another showed a starkly naked subject posed in a reclining position. The undisputed testimony was that the pictures cost about five for one cent to produce. Three packets, a total of nine pictures, were sold by the Petitioner to the policeman for $14.00.

It was testified that, assisting the police officer to make his selection of pictures, the Petitioner said helpfully, "We had one in here where the male had a very large penis". After a fruitless search, he explained that the particular picture was sold out because it was greatly in demand by women customers for purposes of exciting themselves sexually prior to consortium. In the words of the Petitioner, ". . . it was a large seller, a lot of women wanted to buy them up to heat themselves up for their husbands" (*T.T. 11).

Testifying for the State were an art professor — art consultant, concededly an expert on art, who testified that the pictures were devoid of any merit. Similar testimony was offered by a professional photographer whose qualifications as an expert in photography were admitted. The dean of an art institute, who also teaches courses in art, and an art critic, writer of a column on art for a local newspaper, whose background includes experience as the curator of an art museum, testified that the pictures lacked any artistic merit. The trial record contains uncontradicted testimony that the pictures have prurient appeal for the average person and others. The State's evidence was unrebutted, the Petitioner electing not to offer any evidence.

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* Trial transcript.

The trial judge found the pictures to be hard core pornography and obscene by any standards (T.T. 51). The Court of Special Appeals of Maryland made an independent determination that the pictures are hard core pornography (Petitioner's Brief, p. 13). The Maryland Court of Appeals denied certiorari.

ARGUMENT

I.

THE MARYLAND STATUTE FOR VIOLATION OF WHICH THE APPELLANT WAS CONVICTED IS CONSTITUTIONAL.

The Appellant was convicted for the violation of Article 27, Section 418(a) of the Annotated Code of Maryland (1957 Edition) which makes it a misdemeanor to "knowingly . . . sell . . . any lewd, obscene or indecent . . . picture . . ." (Petitioner's Brief, p. 2).

The statute withstood attack on constitutional grounds in an earlier case. *Monfred v. State,* 226 Md. 312 (1961). This Court denied certiorari, 368 U.S. 953.

Obscenity is not constitutionally protected. *Roth v. United States; Alberts v. California,* 354 U.S. 476 (1957). The majority of this Court has consistently upheld the constitutional right of a State to punish the sale of obscene material, holding that there is nothing in the Due Process Clause of the Fourteenth Amendment which forbids prosecution of the seller of pornography. Rather than any turning away from the prevailing constitutional doctrine declared in *Roth,* this Court has repeatedly affirmed the basic holding in that case.

The Petitioner's contention that the publication of material may be proscribed only when it constitutes a clear and present danger urges the Court to adopt a doctrine already considered and rejected. *Roth v. United States,*

supra. In the light of the holding that obscenity is not constitutionally protected expression, the thrust of any argument in favor of the application of the clear and present danger doctrine is ineffective. 5 A.L.R. 3rd 1172. While recognizing some minority sentiment for the adoption of other principles, the determination of obscenity in recent cases decided by this Court has turned upon the application of *Roth-Alberts* standards. *Redrup v. New York; Austin v. Kentucky; Gent v. Arkansas*, 386 U.S. 767 (1967).

II.

THE PICTURES IN THIS CASE ARE OBSCENE BY CONSTITUTIONAL STANDARDS.

The trial record reflects proof of obscenity which fully measures up to the standards described in *Roth, supra*, in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), and in *Ginzburg v. United States*, 383 U.S. 463 (1966). There is ample support for the conclusion of the fact-finder that there is a coalescence of the elements to establish obscenity (1) that the pictures appeal to a prurient interest in sex, (2) that they are patently offensive, and (3) that they are utterly without any redeeming social importance. The Petitioner offered no evidence that the pictures have any quality that might be considered redemptive. Indeed, it was conceded on appeal to the Court of Special Appeals of Maryland that the pictures are utterly without redeeming social importance. Petitioner's Brief in the Court of Special Appeals, p. 5, states, "It is conceded by the Appellant that the material is without redeeming social value". The concession was duly noted by the appellate court in its affirmance of the trial court. See the opinion of the Court of Special Appeals, Petitioner's Brief, p. 13.

The pictures in the case at bar far exceed the candor of the pictures in *Manual Enterprises v. Day*, 370 U.S. 478 (1962). In that case, none of the pictures directly showed

the genitals. Models were posed with genitals obscured or with some object interposed in front of the genital area. In this case, the pictures are of flagrantly nude males exhibited with penis in full erection and, in at least one instance, fondling the organ. They are patently offensive, an erotic display going far beyond acceptable limits of candor and well deserving the hard core label impressed upon them by the courts below.

If there is any doubt of the essential nature of the pictures, the trial record reflects convincing evidence of pandering on the part of the Petitioner. He actively assisted in the selection of the pictures with the declared intention to provide those with maximum erotic appeal. He freely acknowledged that female customers sought his wares for purposes of titillation and used them to arouse themselves sexually in advance of conjugal coitus. Accordingly, the circumstances of the sale of the pictures strongly supports the conclusion that they are not constitutionally protected. *Ginzburg v. United States, supra.* Additional support for such finding lies in the vast disparity between cost and sale price and the huge profit markup.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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For Respondent.